Supreme Court, U.S.
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NO. 85-964

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

LIBERTARIAN PARTY OF VIRGINIA, et al.,

Petitioner,

v.

EARL DAVIS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a State ballot access law requiring presidential elector petitions for independent candidates to include the signatures of at least 200 qualified voters from each of ten congressional districts in the State on its face violates the First and Fourteenth Amendments.

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STATEMENT OF THE CASE

Petitioners seek this Court's review of an order of the United States Court of Appeals for the Fourth Circuit affirming the action of the United States District Court for the Eastern District of Virginia in dismissing petitioners' complaint undr Fed. R. Civ. Pro. 12(b)6 for failure to state a claim upon which relief could be granted.

The plaintiffs in the district court (petitioners herein), on July 26, 1984, filed a complaint for declaratory and injunctive relief, seeking to have § 24.1-159 of the Code of Virginia[1] declared to be in violation of the First and Fourteenth Amendments to the United States Constitution, insofar as it requires the filing of petitions containing the signatures of at least 200 qualified voters from each of Virginia's ten congressional districts (the "distribution requirement"), and insofar as the petition signatures must be witnessed by a qualified voter of the same congressional district as the voter signing the

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[1]The text of § 24.1-159 is printed as Appendix C to the Petition in this case.

petition (the "witness requirement"), in order for groups other than political parties to have the names of their electors for president and vice-president printed on the official presidential election ballot.

The defendants (respondents herein), being members of the Virginia State Board of Elections, on August 20, 1984, filed a motion to dismiss or in the alternative for summary judgment and accompanying brief, to which the plaintiffs failed to respond within the time permitted by Local Rule 11(F). The district court, on September 6, 1984, granted the defendants' motion to dismiss. Libertarian Party of Virginia v. Davis, 591 F.Supp. 1561 (E.D. Va. 1984). The Court of Appeals affirmed the district court's action on July 8, 1985. Libertarian Party of Virginia v. Davis, 766 F.2d 865 (4th Cir. 1985). A petition for rehearing en banc was denied in an order entered August 8, 1985.

REASONS FOR DENYING THE PETITION

1. The Court of Appeals Gave Full Consideration To The Question Presented And Decided It Correctly.

Prior decisions of this Court establish the follow-

ing: A state may place restrictions on access to the election ballot in the interest of protecting the integrity of the political process from frivolous or fraudulent candidacies. A state may not impose restrictions which amount to insurmountable obstacles to the ballot; the system of access must be more than theoretically open. A state may require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. In so doing, it may distinguish in its restrictions among major political parties, minor political parties and independent candidates, as representing alternative routes to the ballot. Anderson v. Celebrezze, 460 U.S. 780 (1983); Clements v. Fashing, 457 U.S. 957 (1982); American Party of Texas v. White, 415 U.S. 767 (1974), reh'g denied, 416 U.S. 1000 (1974); Storer v. Brown, 415 U.S. 724 (1974), reh'g denied, 417 U.S. 962 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Jenness v. Fortson, 403 U.S. 431 (1971).

The statute in issue here, § 24.1-159, imposes what fairly may be characterized as minimal burdens on groups, other than political parties, who seek access to

the ballot. The statewide minimum number of petition signatures required is set at one-half of one percent of registered voters. The signer pool is not reduced by other restrictions such as a disaffiliation requirement. Those who sign the petitions are not required to vote for the candidates the petitions support. The time within which signatures may be obtained, in this case, from January 1 to August 24, 1984, is eight months. The petitioners needed to obtain less than one signature per day in each congressional district to meet the required minimum of 200 signatures per district.

Petitioners, as plaintiffs in the district court, did not allege any facts from which, if proven, a court could conclude that the particular requirements of § 24.1-159 presented an undue burden to petitioners in their attempts to gain access to the ballot.[2] It cannot be concluded from the allegations in the complaint that

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[2]That the requirements of § 24.1-159 did not in fact present an insurmountable obstacle to groups other than the established political parties, such as the petitioners, to gain access to Virginia's 1984 presidential ballot is shown in footnote 10 at page 16 of the Petition.

petitioners made any attempt at all to comply with the statute. It is clear from the complaint, from the failure to respond to the motion to dismiss and from petitioners' briefs on appeal, that they attack the facial validity of § 24.1-159.

The Court of Appeals, as did the district court before it, tested § 24.1-159 against the applicable case law and decided, correctly, that the statute's requirements are much less burdensome than those of other ballot access schemes which this Court has found to be constitutional.

a. The Distribution Requirement

With regard to the distribution requirement, the Court of Appeals noted that it "operates evenhandedly and does not allow voters from one district to control access to the State's ballot," in contrast to enactments found to be unconstitutional in other cases. Libertarian Party of Virginia, 766 F.2d at 868. The Court specifically recognized the important State interests which support the requirements of § 24.1-159, 766 F.2d at 868-69, and concluded that "the distribution requirement is

both reasonable and nondiscriminatory and is justified by the recognized State interest in protecting the electoral process from the undue burden posed by frivolous candidates and insincere ballot cluttering." 766 F.2d at 869. The Court of Appeals cites with approval Udall v. Bowen, 419 F.Supp. 746 (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976), in which a three-judge district court upheld as constitutional an Indiana statute requiring candidates to obtain signatures of 500 registered voters from each of eleven congressional districts as a prerequisite to being placed on the Indiana presidential preference primary ballot. Libertarian Party of Virginia, 766 F.2d at 869. Udall stands squarely for the principle that geographical signature distribution requirements based upon districts of substantially equivalent population, such as congressional districts, do not offend the Constitution in ballot access cases.[3] As the

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[3]See also Moritt v. Governor of New York, 397 N.Y.2d 929, 366 N.E.2d 1285 (1977), appeal dismissed, 434 U.S. 1029 (1978) (upholding as constitutional a state law imposing a geographical signature distribution requirement as a means of requiring a candidate's showing of statewide support before his name may be placed on a pri-

Court of Appeals pointed out, signature distribution requirements have been struck down in cases where they result in discrimination against residents of some districts within a state in favor of residents of other districts because of district population differences. Libertarian Party of Virginia, 766 F.2d at 868. The petitioners point to no case wherein this Court has invalidated a proportional distribution requirement.

b. The Witness Requirement

With regard to the witness requirement, the Court of Appeals recognized the State's legitimate interest in preventing election fraud by assuring the genuineness of signatures on petitions, and it endorsed the district court's rationale that the requirement that a witness be from the same congressional district as the petition signer "serves the important purpose of assuring some indication of geographic as well as numerical support" of statewide candidates for office. 766 F.2d at

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mary ballot).

The statutes in Udall and Moritt were upheld over the objection in the dissenting opinion in each case that the distribution requirement allows the power of voters of one district to dilute that of voters in all other districts.

869-70. The Court adopted the reasoning of the district court in Howlette v. City of Richmond, 485 F.Supp. 17 (E.D. Va.), aff'd, 580 F.2d 704 (4th Cir. 1978), which upheld a notarization requirement for citizens signing a bond referendum petition. In discussing the question whether the individual notarization requirement was "unduly burdensome," the Court in Howlette relied upon this Court's decision in American Party of Texas v. White, 415 U.S. 767 (1974), reh'g denied, 416 U.S. 1000 (1974), upholding a Texas election law which required individual notarization of signatures on nominating petitions for small party candidates. Howlette, 485 F.Supp. at 28. In Howlette, following American Party, the Court was persuaded by the fact that "plaintiffs did not even attempt compliance with the individual notarization requirement," and that they objected to the requirement "'but make little or no effort to demonstrate its impracticability or that it is unusually burdensome.'" Howlette, 485 F.Supp. at 28, quoting American Party, 415 U.S. at 787. The same may be said of petitioners in the case at bar. The Court of Appeals in this

case was correct in upholding the facial constitutionality of the witness requirement of § 24.1-159.

2. The Decision Of The Court Of Appeals Does Not Present A Conflict With The Decision In Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985).

According to the petitioners in this case, the question presented to this Court is "[w]hether a State ballot access law requiring presidential elector petitions to include the signatures of at least 200 qualified voters for each of all ten congressional districts in the State violates the First and Fourteenth Amendments." No such question was decided in Bergland v. Harris. The statutory scheme there at issue is entirely different from § 24.1-159. In these regards, therefore, there is no conflict between the courts of appeals on the question presented here.

Furthermore, in Bergland, the district court had before it conflicting exhibits and affidavits, which provided a limited factual record for review of the Georgia ballot access provisions in question. The court also was faced with provisions of the Georgia Code governing analogous situations which were inconsistent with the

statutory provisions under attack and which placed in question the State's asserted interests in justification of the particular requirements at issue, as expressed in the State's affidavits. The Court of Appeals noted that "[t]here is nothing in the record to explain the discrepancy between these provisions and the ones plaintiffs challenge," and that "[t]here is an insufficient factual record" to carry out the analysis required by Anderson v. Celebrezze. Bergland v. Harris, 767 F.2d at 1554. The Court of Appeals vacated the district court's dismissal of the complaint and remanded for further proceedings.

In the case at bar there are no inconsistent statutory provisions requiring explanation, nor is there any factual dispute involved. The petitioners have not alleged or offered for the record any facts at all from which a court could conclude that they are unduly burdened by the requirements of § 24.1-159. They rely instead exclusively upon conclusory allegations challenging the facial validity of the statute, which the courts below properly disposed of.

The distinguishing factors identified above demonstrate that there is no conflict between the decision of the Court of Appeals in this case and that in Bergland v. Harris for this Court to resolve.

3. The Question Presented Is Not Sufficiently Important To Warrant This Court's Attention.

The heart of this case is petitioners' challenge to the signature distribution requirement of § 24.1-159. Petitioners point out in footnote 2, pages 3-4 of the Petition, that only four other states have some form of a signature distribution requirement, and that Virginia's statute is the only one which requires signatures from each of its ten congressional districts as a means of demonstrating statewide support for candidates for statewide office. Because the Virginia statute is unique, any decision by this Court in the matter will have very limited application. Thus, the question presented is not of sufficient importance to warrant the Court's attention.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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